

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 704 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No
2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

DAYALJI JETHABHAI CHANDARANA

Versus

MANHARLAL TALAKSHIBHAI JASVANI

Appearance:

MR PV HATHI for Petitioner
MR BA VAISHNAV for Respondent No. 1
MR VINAYAK D PANDYA for Respondent No. 2

CORAM : MR.JUSTICE R.R.JAIN

Date of decision: 19/02/97

ORAL JUDGEMENT

The applicant is original defendant No.1 in Regular Civil Suit No.101 of 1978 filed by the respondents in the Court of the Civil Judge (J.D.) at

Botad. From the record it appears that respondent No.1 plaintiff filed a civil suit for getting possession from the present petitioner and respondent No.2 - original defendant No.2. Despite service of process, the present petitioner did not appear. Consequently, on the strength of the evidence adduced by respondent No.1 - plaintiff and respondent No.2 - defendant No.2, the matter was finally disposed of vide the judgment and decree dated 31st July 1984. Feeling aggrieved by that order, respondent No.1 - original plaintiff carried the matter to the lower appellate court by preferring Regular Civil appeal No.170 of 1984. Vide order dated 23rd March 1993, the learned Joint District Judge, Bhavnagar set aside the judgment and decree passed in Regular Civil Suit No.101 of 1978 on 31st July 1984 and remanded the matter to the trial court with the direction to decide the application for amendment of the plaint and shall proceed further in accordance with law and decide the whole suit afresh. It is in this background of the matter, the present petitioner approached the trial court vide application at Exhibit 116 and requested to set aside the order of ex parte proceeding and permit him to participate. The petitioner also filed written statement along with the application at Exh.117. The same was filed with due permission of the court below. Thus, it is amply clear that, in compliance with the lower appellate court's order, the petitioner approached the trial court and applied for appropriate procedure with a view to enable him to defend the litigation on merits.

2. Since in the original proceeding the plaintiff and defendant No.2 had already given evidence, the mere fact of setting aside ex parte decree does not entitle them to adduce further evidence. It is only petitioner defendant No.1 in whose absence decree was passed is entitled to lead evidence and accordingly adduced evidence at Exh.128 in the capacity as party, i.e. defendant No.1. The petitioner was also cross-examined by the plaintiff and defendant No.2. As the evidence of defendant No.2 and his witness was also over in absence, the petitioner also applied vide Exh.133 for recalling of witnesses with a view to cross-examine. The court vide its order dated 30th March 1996 rejected that application refusing permission to the petitioner - defendant No.1 to cross-examine. Aggrieved by this order, the petitioner - defendant No.1 has preferred this revision application.

3. From the order passed by the lower appellate court in Regular Civil Appeal No.170 of 1984, it clearly transpires that the judgment and decree passed in Regular Civil Suit No.101 of 1978 on 31st July 1984 has been set

aside. As the judgment and decree has been set aside, the effect would be as if no decree has been passed and the parties to the litigation would stand relegated to their original position with right to avail of opportunities available under law. In this case, the decree was passed in absence of the present petitioner who did not exercise right of cross-examination, but now when the decree has been set aside, the present petitioner would be at liberty to adduce evidence as well as cross-examine the witnesses who have already been examined in the matter. As discussed above, the petitioner himself has already been examined at Exh.128 and offered for cross-examination.

4. Under the present legal system of adversary and rules regarding order of examination, other side has right to cross examine and unless the evidence is tested on the anvil of cross examination, has no evidential value. An evidence unless tested as above cannot be referred on merits for considering rival contentions. In the result, both the witnesses namely Exh.50 and Exh.61 deserves to be recalled with direction to offer for cross examination.

5. It is true that right from the beginning the petitioner has been negligent and did not appear before the trial court as well as the appellate court, but while considering the question of permission to cross-examine the witnesses, this aspect would not be relevant when the decree passed ex parte in his absence has already been set aside and the matter has been remanded. The delay on the part of the present petitioner would have been relevant while considering the question of setting aside the decree but nonetheless would be relevant for the purpose of recalling witnesses for cross examination after the matter has already been remanded and the decree and judgment has been set aside. I have perused the impugned order below Exh.133. In my opinion, the learned Judge has been over weighed with the delay aspect while rejecting the application for permitting the petitioner to cross-examine the witnesses of respondent No.2. The learned Judge should not have entered into the arena of delay since the question has already been decided by the lower appellate court while considering the question of setting aside the ex parte decree.

6. In the result, the impugned order is patently erroneous and has to be quashed and set aside. The petition is allowed. The order passed by the trial court below Exh.133 in Regular Civil Suit No.101 of 1978 is quashed and set aside. The prayer for recalling

witnesses for cross examination is hereby allowed. Rule
made absolute accordingly with no order as to costs.

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